

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-2437^B
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

APPELLEE

vs.

RAYMOND JOHNSON,

APPELLANT

On Appeal from United States District Court
for the District of Vermont

BRIEF FOR THE APPELLANT

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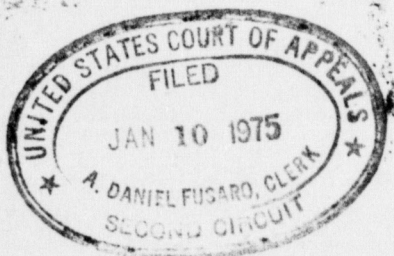


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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| UNITED STATES OF AMERICA, | : | |
| Appellee, | : | |
| | : | |
| v. | : | Docket No. |
| | : | 74-2437 |
| | : | |
| RAYMOND JOHNSON, | : | |
| Appellant | : | |
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BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

This appeal is from the jury conviction on June 13, 1974, of Raymond Johnson of Counts I and II of a four-count indictment, docket #74-36, United States District Court for the District of Vermont, Chief Judge James S. Holden presiding. This appeal is also from orders entered by Chief Judge Holden denying Johnson's motions for judgment of acquittal, for a new trial, and in arrest of judgment, which orders were made on June 12, 1974, at the close of the evidence, and on October 11, 1974, after the jury verdict.

ISSUES FOR REVIEW

1. Did the District Court err in denying Defendant's Motion for Judgment of Acquittal at the close of the evidence?
2. Did the District Court err in denying Defendant's Motions to set aside the jury verdicts of guilty as to Counts I and II and to enter Judgment of Acquittal for Defendant?
3. Did the District Court err in denying Defendant's motion to set aside the jury verdicts of guilty as to Counts I and II and to order a new trial?
4. Did the District Court err in denying Defendant's motion to arrest the judgment of guilty as to Count I?

STATEMENT OF THE CASE

A. Proceedings below:

By indictment dated January 10, 1974, Raymond Johnson and Stephen Loewe were indicted on three counts in criminal No. 74-7 for the United States District Court, District of Vermont. Defendant Johnson pleaded not guilty to each of the three counts.

By indictment filed April 4, 1974, superseding charges stated in four counts were brought against defendant Raymond Johnson. The superseding indictment, docket no. Cr. 74-36 for the United States District Court, District of Vermont, repeated the three counts alleged in the previous indictment and added one count (count one) alleging that Johnson had taken part in an unlawful conspiracy in violation of Title 21, §§812, 952(a). Count two alleged that Johnson imported methamphetamine in violation of title 21, sections 812, 952, 960 and title 18, section 2, United States Code. Count three alleged that Johnson possessed, with intent to distribute, methamphetamine in violation of title 21, section 841 and of title 18, section 2, United States Code. Count four alleged that Johnson imported merchandise in violation of title 18, sections 545 and 2. Johnson pleaded not guilty to all four counts.

Trial by jury took place on June 10-13, 1974. Johnson's motions for judgment of acquittal at the close of the Government's evidence and at the close of all of the evidence were denied. Objections to admission

of certain statements made by Johnson and of substance found to contain methamphetamine (Exhibits 1,2) were overruled. Prior to submission of the case to the jury, the Government withdrew count four. Verdicts of guilty were returned as to count one (conspiracy) and count two (aiding and abetting importation of controlled substance). A verdict of not guilty was returned on count three (aiding and abetting possession with intent to distribute a controlled substance).

Johnson thereafter moved for judgment of acquittal as to counts one and two and in the alternative for a new trial as to counts one and two, and also in the alternative to arrest the judgment of guilty as to count one. The District Court, Hon. James S. Holden, Chief Judge, denied Johnson's motions.

By order filed October 15, 1974, Johnson was sentenced under the Federal Youth Corrections Act to be in the custody of the Attorney General for treatment and supervision under provisions 18 U.S.C. §5010(b) until discharged by the division under §517(c).

Notice of appeal was filed by Raymond Johnson on October 17, 1974.

B. Facts

On December 28, 1973, a car owned and operated by Stephen Loewe entered the United States from Canada at the port of entry at Highgate Springs, Vermont. (Transcript, Pages 25, 174, 185). Upon arrival at the port of entry at approximately 2 p.m., Customs Inspector Hurley decided that Loewe's car should be referred to secondary inspection for more thorough examination. (Tr. 26-27). Customs Inspector Hamilton inserted a probe flashlight through the opening of the window of the door on the passenger's side of Loewe's vehicle and observed what appeared to be a piece of plastic or plastic bag at the bottom of the door cavity. (Tr. 30, 30-A, 324). The piece of plastic or the plastic bag was completely hidden from view inside the door panel, so that someone sitting in the passenger's seat or opening the passenger's door would not be able to see it. (Tr. 37) Customs Inspector Hamilton then obtained a screwdriver and undid the door panel of the passenger's side of Loewe's car. Upon undoing the panel Inspector Hamilton pulled out two cellophane-type bags, one larger than the other,

from the door cavity. (Tr. 30-A, 31) Customs Inspector Hamilton put his initials on the two bags and gave them to Acting Port Director Clark. (Tr. 31, 33) Johnson and Loewe had been standing near the passenger door, and upon the opening of the door panel and removal of the first bag, they were taken inside the office of the Immigration and Customs Service. (Tr. 34, 324-25) The two plastic or cellophane-type bags contained matter described as white grainy substance. (Tr. 42). The bags were labeled Exhibits 1 and 2 at trial.

Customs Inspector Hamilton gave the two plastic bags to acting Port Director Clark (Tr. 33, 42), who weighed them to be 525 grams (Tr. 44) and placed them in a safe at the office at Highgate Springs. (Tr. 45) December 28th was a Friday, and Acting Port Director Clark testified that he mailed the packages to Boston on the following Monday. (Tr. 45). There was no testimony concerning whether or not the safe was locked during the period between Friday and Monday; nor was there any testimony as to who may have had access to the safe in that time interval.

The chemist, Anna E. Finnerty, testified that she received a package from Highgate Springs, Vermont, on January 8, 1974 and that the two plastic bags in the carton had a gross weight of 315 grams, or 210 grams less than the weight measured by Acting Port Director Clark. (Tr. 138-139, 152-153) There was no testimony concerning the manner in which any sealing of the plastic bags was done by Acting Port Director Clark. Objection by Johnson to admission of Exhibits 1 and 2 for lack of showing of proper sealing and chain of custody of the exhibits was overruled by the District Court. (Tr. 151, 153)

Special Agent Garry Gardner of United States Customs Service was called to Highgate Springs following the finding of the two plastic bags in Loewe's car and arrived at the scene around five o'clock p.m. (Tr. 46-47). Special Agent Gardner proceeded to interrogate Johnson and took an oral statement from him after Gardner arrived at the office. A hearing was held on the admissibility of the statement given by Johnson to Gardner outside the presence of the jury. (Tr. 51) Special Agent Gardner testified outside the presence of the jury that he read Miranda warning form to Johnson but that he did not

advise Johnson as the possible charges which could be brought against him. (Tr. 52, 53, 55-56) Special Agent Gardner testified that he did not advise Johnson that he was a suspect in drug smuggling. (Tr. 56, 85) The form used by the U. S. Customs Service had two parts to it, the first part being the advice of rights, and the second part being a statement of waiver of those rights. There is a place below the waiver portion of the form for a person to sign, but no other place on the form for a signature. (Tr. 52-53) Special Agent Gardner did not read the waiver portion to Johnson (Tr. 55) but testified that he asked Johnson to sign the form merely for the purpose of acknowledging that he had been advised of his rights. (Tr. 55) Special Agent Gardner handed the form to Johnson who looked at it for "maybe fifteen to twenty seconds, or thirty seconds, approximately" and then signed it. (Tr. 52, 53, 55, 86) At no time did special Agent Gardner specifically ask Johnson if he waived his rights to remain silent, to consult a lawyer, to have a lawyer present during questioning, to have a lawyer appointed to represent him if he could not afford one. The District Court overruled objection to admission

of statements given by Johnson to Special Agent Gardner.
(Tr. 88-89)

Special Agent Gardner testified that Johnson stated he had hitchhiked to Canada (Tr. 91), that he had gone to St. Jean, Quebec, to visit a girl (Tr. 92), that he had been hitchhiking south and had been picked up by Loewe, whom he had not seen before that day. (Tr. 94) Special Agent Gardner testified that Johnson further informed him that he, Johnson had not been to Walpole, New Hampshire (Tr. 95).

Prior to the time that Special Agent Gardner had arrived at the Highgate Springs office, Johnson and Loewe were seated side-by-side in the immigration office from the time of the discovery of the plastic bags, or approximately 2:15 p.m. (Tr. 103-04). During the approximate three hour time period when Johnson and Loewe were awaiting the arrival of special agent Gardner, Johnson asked Customs Inspector Kiniry " does it matter that I am a hitchhiker?" (Tr. 107) The question asked by Johnson was in the presence of Loewe. (Tr. 108)

Special Agent Grant of the U. S. Customs Service testified that he participated in an arrest of Johnson on January 8, 1974 and that following Johnson's arrest he, Johnson, made a statement to the effect that he had

never been in Canada. (Tr. 135)

Johnson testified on his own behalf that he had known Stephen Loewe for several years and that Loewe had lived in Connecticut initially but had moved to Walpole, New Hampshire about four years ago. (Tr. 310-11)

Johnson maintained periodic contact with Loewe following Loewe's move to New Hampshire (Tr. 311).

Johnson chronicled his trip to Canada with Loewe (Tr. 313-16) and his actions after they arrived in Canada (Tr. 313-22). Johnson denied any knowledge of the presence of any illegal drugs in Loewe's car (Tr. 322) and became panic-stricken when he observed the Customs Inspectors find and remove the plastic bags from Loewe's car. (Tr. 325)

Johnson was then searched by a Customs Inspector (Tr. 325-26) and observed the plastic bags prior to the arrival of Special Agent Gardner. (Tr. 327) Johnson testified that he made false statements to Gardner concerning his having hitchhiked to and from Canada and with respect to his knowledge and association with Loewe because he did not want to get involved with the situation. (Tr. 327-28) The testimony of Loewe was to the same effect. (Tr. 176, 193, 180-83, 185-86) At the time of trial, Loewe had

pleaded guilty to a charge of possession of illegal drugs with intent to distribute them (Tr. 174-75) and was awaiting sentence to be imposed. (Tr. 190-91) During the trial in June of 1974, both Johnson and Loewe readily acknowledged that they had made one other trip to Canada in the fall of 1973, although neither of them could be specific as to the exact time in the fall of 1973, some six to seven months earlier, when that trip occurred. (Tr. 223-24, 249-50, 271-72, 342, 344, 353). According to Exhibit 5 and the testimony Mercier, a Customs Service log indicated that Loewe and Johnson entered the United States from Canada during the early morning of December 9, 1973. (Tr. 421, 424) On that occasion the car operated by Loewe had been referred for secondary inspection also, was examined more thoroughly, but there was no testimony that any illegal drugs were found. (Tr. 421, 352)

Objection was made to the omission of the District Court to give requests to charge No. 9 and No. 10. requested by Johnson, and to the failure to give the complete request No. 11. (Tr. 473, 498). Four other exceptions to the charge of the District Court also were brought to the attention of the Court prior to the start of deliberations by the jury. (Tr. 498-501).

ARGUMENT

A. THE DISTRICT COURT ERRED IN DENYING JOHNSON'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE.

1. The evidence was not sufficient to allow the jury to conclude that Johnson was guilty beyond a reasonable doubt of the offenses charged.

The evidence in this case was entirely circumstantial with respect to Johnson's guilt or innocence. It may be summarized fairly, as follows:

- a. Johnson was present in a car owned and operated by Stephen Loewe where illegal drugs had been secreted.

- b. Johnson had known Loewe for a number of years, had associated with him from time to time, and had traveled from New Hampshire to Canada and back on this and one other occasion.

- c. After the illegal drugs were found, Johnson lied about his acquaintance with Loewe.

The cases are legion that mere presence is not sufficient evidence to sustain a conviction for possession of illegal drugs where more than one person is present or has had the potential ability for control of the place

where the drugs are found. See, e.g., United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974); United States v. Bonham, 477 F.2d 1137 (3d Cir. 1973); Evans v. United States, 257 F.2d 121 (9th Cir.) cert. denied, 358 U.S. 866 (1958); Guevara v. United States, 242 F.2d 745 (5th Cir. 1957); Mulligan v. State, 513 P.2d 180 (Wyo. 1973). See IX Land & Water L. Rev. 237 (1974) (13 other states cited in support of proposition). Therefore, something more - i.e., evidence - must be proved to connect the defendant to the illegal drugs.

In this case, not one shred of evidence connects Johnson directly to the contraband. There are no fingerprints of Johnson, no drugs found on him, no evidence of his contributing to payment for the drugs - nothing.

As such, the Government's case is identical to the situations in United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974) and United States v. McConney, 329 F.2d 467 (2d Cir. 1964). In Lopez-Ortiz, defendant and two others were convicted of conspiracy to violate the drug laws and of possession of illegal drugs with intent to distribute. The three were arrested by federal agents who had watched suspicious activity and then moved in during an operation of unloading marijuana from a vehicle

parked in the driveway adjoining a house. Lopez-Ortiz was found hiding behind a rock wall which separated the back yard of the house and driveway from a neighbor's. At trial, Lopez-Ortiz stated that he was an illegal immigrant who had crossed the border two days earlier and had been knocking on the door of the house in hopes of getting food when the raid occurred. He further stated that he tried to flee to avoid deportation. His testimony was impeached in that he previously had stated that he had been in the house prior to the raid for several hours.

The Fifth Circuit ruled that the issue was not one of Lopez-Ortiz' credibility; rather, it was of the sufficiency of the evidence connecting him to the marijuana. Because there was no evidence that Lopez-Ortiz participated in the unloading operation or that he fled from the truck or that he had done anything other than be found in the vicinity and had tried to flee, the Court ruled that his conviction could not be sustained.

The same principle should govern this case. All that Raymond Johnson did was to be found in the vicinity and to have lied after the drugs were found. No evidence connects him with the drugs. No evidence shows how Johnson is supposed to have participated in the importation of

the illegal drugs. Suspicion cannot take the place of proof of acts performed by Johnson that would have indicated his participation in the scheme.

Johnson's situation is analogous to that found in United States v. McConney, 329 F.2d 467 (2d Cir. 1964). The defendant there was prosecuted under the Mann Act. The evidence relied upon by the Government was as follows. A woman in Bridgeport, Connecticut, operated a house for prostitution. She received a telephone call from defendant's wife who resided in New York state with her husband. Defendant's wife came to Bridgeport a few days after the phone call in a New York car driven by defendant, who stayed there one hour and then left. Defendant's wife then engaged in prostitution for a period of time. Defendant subsequently visited Bridgeport for an overnight period and then retrieved his wife several days later. When interviewed by the FBI, the defendant denied having driven his wife to Bridgeport, denied knowing the Bridgeport woman and denied having been to Bridgeport during the past twenty years.

This Court ruled that in order to convict the defendant too much weight would have to be placed on his extra-judicial false exculpatory statements. Other evidence of guilt was extremely weak. There was no evidence

to show that McConney's statement, that he had transported his wife to any place for the purpose of prostitution, was false, that he knew or intended his wife to engage in prostitution, or that he knew the Bridgeport house to be one of prostitution. Therefore, McConney's conviction was reversed.

Again, the situation here is the same as in McConney. In order to sustain Johnson's conviction, too much weight has to be placed on his extra-judicial false exculpatory statements. The only other evidence of guilt is Johnson's presence in Loewe's car and his association with Loewe as a friend. There is no evidence to show that Johnson's statement that he did not know of the presence of drugs in the car was false. There is no evidence that Johnson knew Loewe transported illegal drugs or that Johnson knew Loewe dealt in illegal drugs. This Court should therefore reverse Johnson's conviction and enter a judgment of acquittal.

This result is further buttressed by the cases of United States v. Terrell, 474 F.2d 872 (2d Cir. 1973) (operation of car needed to be shown in order to sustain conviction; knowledge and presence not sufficient to prove aiding and abetting), United States v. Steward, 451 F.2d

1203 (2d Cir. 1971), United States v. Cianchetti, 315 F.2d 584 (2d Cir. 1963) (must show more than mere knowledge, i.e., promotion of venture, adoption of venture as his own, stake in outcome of conspiracy), and United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962) (to be aider and abettor, defendant must in some sort associate himself with venture and by his action seek to make it succeed). Those cases all stand for the proposition that, in connection with conspiracy and aiding/abetting prosecutions involving drugs, knowledge plus presence is generally insufficient to prove the crimes. Some affirmative attempt, some participation must be shown; it is not enough that the defendant was a spectator. Johnson did not drive the car, did not provide the car, did not provide any funds for purchase of the illegal drugs. He simply was present, and then gave false statements to the investigators after the crime had been discovered, foiled and was beyond the point of being able to be committed successfully.

The Government has argued that Johnson's and Loewe's testimony was so inherently incredible so as to be unbelievable and that therefore Johnson must have known of the presence of the illegal drugs and somehow participated in aiding and abetting Loewe, citing United States v. Pui Kan Lam, 483 F.2d 1202 (2d Cir. 1973), cert. denied 415 U.S. 984

(1974). Pui Kan Lam involved much different circumstances than those in this case. There, the Court upheld Leung Lam's conviction as aiding and abetting possession of contraband. The drugs in that case involved three pounds of heroin that had been cached in an apartment wall. Leung Lam had taken at least two or three other trips to the apartment neighborhood with the other three co-defendants, was a brother of one of them, furnished all support for his brother, and had proposed a restaurant venture of which he would be "boss" of the other three co-defendants. Moreover, Leung Lam walked up and down the sidewalk in a manner which might properly have been inferred to be as a lookout. On top of this conduct, Leung Lam made false exculpatory statements of an incredible nature to the effect that he was looking for yarn and needed an interpreter. Thus, the Court opined that the evidence, while less than overwhelming, supported the inference that Leung Lam was the "manipulative leader" of the four.

In Johnson's case, there are no facts comparable to Leung Lam's. Johnson did not drive the car. Johnson was not acting as a lookout. Johnson simply was there, and then, when confronted with the discovery of the plastic bags containing the illegal drugs and after being searched

and held at Highgate Springs for three hours before questioning, told Special Agent Gardner some lies in order to try to keep from being involved. While he had accompanied Loewe on one other trip to Canada, Loewe's car had been searched on that occasion and not found to contain any illegal drugs. Moreover, Johnson was hardly a "provider and proposer" or a "manipulative leader," as Leung Lam was. Rather, Johnson was "an unwitting innocent" "caught in a police dragnet." Johnson's testimony that he slept soundly at the motel in St. Jean so as not to know that Loewe left and that he went along with Loewe purely for the ride and to check for motorcycles and parts are not so inherently incredible as were the statements made by Leung Lam.

As such, Johnson's situation is much more akin to that of United States v. Kearse, 444 F.2d 62 (2d Cir. 1971). There, defendant was convicted of knowingly possessing goods stolen in interstate commerce. The conviction was reversed by this Court for lack of sufficient evidence. That evidence showed the following circumstances: Three men hijacked forty cartons of knitwear. Acting on an informer's tip, FBI agents procured a search warrant for an apartment. After a knock got no response, an agent announced his identity and purpose, Upon hearing sounds inside, agents broke in the door and found the stolen

cartons of knitwear. Approximately six feet from the stolen goods, Kearsse was seen standing in an archway between the room with the stolen merchandise and a kitchen. There was no evidence to connect Kearsse with the stolen goods or the apartment. Kearsse stated that he had gone to the apartment to get methadone from a person named Molloy, one of the lessees of the apartment, and was waiting for Molloy to return. Kearsse further testified that he had not seen the cartons, since he had been in the kitchen facing away from them. Kearsse also admitted being a heroin addict, whose habit cost \$20 - \$30 per day.

The district judge denied defendant's motion for judgment of acquittal, relying heavily on Kearsse's failure to respond to the FBI's demand for entry and his "incredible denial" that he had seen the stolen goods.

In reversing the conviction, Judge Kaufman stated, 444 F.2d at 64, that proof of "dominion and control" over the goods in question was required in order to convict Kearsse of knowingly possessing stolen goods. "The evidence of presence, with nothing more, was entirely consistent . . ." with Kearsse's testimony. With respect to his denial, "it is not unreasonable to conclude that Kearsse was making an effort to extricate himself from suspicious circumstances". But, concluded the Court, "suspicious . . . are not proof and the evidence before the court was at least as hospitable to an interpretation consistent with Kearsse's innocence .

. . as to the government's theory that Kearsé had dominion over the stolen goods". Finally, it was noted that "Kearsé's behavior in the apartment and his performance on the witness stand point no more strongly to the one hypothesis than to the other." See United States v. Vilhotti, 425 F.2d 1186 (2d Cir. 1971), cert. denied 406 U.S. 947 (1972); United States v. Casalnuovo, 350 F.2d 207 (2d Cir. 1965).

The language used in Kearsé applies exactly to the situation of Raymond Johnson. The evidence of Johnson's presence in Loewe's car was entirely consistent with Johnson's testimony that he knew nothing of the secreted, illegal drugs. Johnson's denials of his acquaintance with Loewe may reasonably be concluded to be an effort by Johnson "to extricate himself from suspicious circumstances." The evidence in this case is "at least as hospitable to an interpretation consistent with" Johnson's innocence as to the Government's theory that Johnson aided and abetted Loewe. Johnson's behavior in the car and his performance on the stand (the Assistant U.S. Attorney alluded to Johnson's "very pleasant image" at page 450 of the transcript) "point no more strongly to the one hypothesis than to the other."

It is clear, therefore, that the evidence of guilt was not sufficient and that the District Court should have granted Johnson's motion for judgment of acquittal.

Johnson's situation is much akin to that found in United States v. Steward, 451 F.2d 1203 (2d Cir. 1971). Steward and Sands were convicted of heroin transportation, conspiracy re same, and aiding and abetting charges. While Steward's conviction was upheld, Sands' was reversed for lack of sufficient evidence. This Court ruled that, "with respect to an aider or abettor who had no physical possession, his constructive possession must be established to warrant the inference of knowledge of illegal importation." 451 F.2d at 1207. This Court went on to say that "Possession, actual or constructive, must be shown with respect to each individual conspirator, facilitator, or aider and abettor." Ibid. Steward's possession could not be attributed to Sands and thereby establish Sands' knowledge of illegal importation. Ibid. While Steward involved prosecution under 21 U.S.C. §173, 174 and 18 U.S.C. §2, the principles governing it apply equally to this case. See United States v. Infanti, 474 F.2d 522, 526 (2d Cir. 1973). There is no evidence upon which the Government can predicate Johnson's possession of the illegal drugs.

His presence in Loewe's car does not rise to dominion and control over the vehicle, as found by the jury's acquittal of Johnson as to Count III.

It is submitted that since the jury acquitted Johnson as to Count III - the possession charge - the condition precedent established by Steward to finding Johnson a conspirator or an aider and abettor is missing. Therefore, this Court, consistent with Steward, must reverse Johnson's convictions.

B. THE DISTRICT COURT ERRED IN DENYING JOHNSON'S MOTION TO SET ASIDE THE JURY VERDICTS OF GUILTY AS TO COUNTS I AND II AND TO ENTER JUDGMENT OF ACQUITTAL.

1. Evidence is not sufficient to substantiate the verdicts of guilty.

The argument in part A applies also to this ground for entering a judgment of acquittal.

The cases of Evans v. United States, 257 F.2d 121 (9th Cir.), cert. denied, 358 U.S. 866 (1958), and Lee v. United States, 376 F.2d 98 (9th Cir. 1967), point out that guilt may not be inferred from mere association with a guilty person. Association may and does breed suspicion, but such is not proof of criminal conduct. Accordingly, the jury would have had to place a great deal of weight

on the admitted lies of Johnson at the time of his interrogation. As in United States v. McConney, 329 F.2d 467 (2d Cir. 1964), too much weight has to be placed on Johnson's false exculpatory statements in order to convict him of conspiracy and of aiding and abetting importation of illegal drugs.

With respect to Count I, (the conspiracy count) the Government relied on the overt act that Stephen Loewe drove his car from Canada to the United States on December 28, 1973. As pointed out in Evans v. United States, 257 F.2d 121 (9th Cir.), cert. denied, 358 U.S. 866 (1958), the overt act is not significant unless it tends to prove the existence or furtherance of a conspiracy. But what evidence is there of a conspiracy in Johnson's case? The record is bare, except for sporadic get togethers of Loewe and Johnson for purposes that were not and could not be shown to be connected to illegal drug dealing, of any evidence from which the legitimate inference of an illegal conspiracy could be drawn. And so, Loewe drove his car from Canada to the United States. So what? There is no showing that Johnson made any affirmative attempt to further the purpose of a conspiracy. See United States v. Cianchetti, 315 F.2d 584, 588 (2d Cir. 1963).

The Government also has argued that the false exculpatory statements made by Johnson after the drugs were found comprise that additional ingredient necessary to sustain his conviction. But, as noted above, such argument was rejected in United States v. McConney, 329 F.2d 467 (2d Cir. 1964), in Lee v. United States, 376 F.2d 98 (9th Cir. 1967) (attempt to escape was not equivalent to aiding and abetting), and in United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974). False statements made after the seizure of the contraband and arrest of its owner can scarcely be said to be designed to adopt the venture as Johnson's and to seek its success. The weight of the evidence does not substantiate the verdicts of guilty. Judgment of acquittal notwithstanding the jury verdicts should be entered.

C. THE DISTRICT COURT ERRED IN DENYING JOHNSON'S MOTION TO SET ASIDE THE JURY VERDICTS OF GUILTY AS TO COUNTS I AND II AND TO ORDER A NEW TRIAL

1. As an alternative to reversing Johnson's convictions and ordering his acquittal, the arguments in parts A and B demonstrate that Johnson should at least receive a new trial. As indicated in the Steward case, supra, knowledge of illegal importation of drugs cannot

be inferred or found until the putative aider and abettor is established to have constructive possession. Possession by Loewe is not enough. See United States v. Infanti, 474 F.2d 522, 526 (2d Cir. 1973) (jury conviction of transporting of stolen securities not sustainable where no showing of actual or constructive possession). Likewise, there has been no showing that Johnson had any indicia of dominion or control, such as arranging for delivery of any of the illegal drugs, participation in purchase or hiding of drugs. Ibid. As in Infanti, supra, and Kearse, supra, and Steward, supra, all that the evidence shows is that Johnson was present when the drugs were discovered to have been hidden in the door panel of Loewe's car.

Thus, the fact that the jury verdict contained an inherent inconsistency is clear. Johnson was acquitted of aiding and abetting the possession of drugs with intent to distribute them. His acquittal is equivalent to a finding that he had no possession of them, actual or constructive. Accordingly, Johnson should have been acquitted of the conspiracy and aiding and abetting importation counts as well. The jury either must have failed properly to understand the Court's instructions,

so as to reach the result it did. This Court, if it does not reverse the convictions and order judgment of acquittal for Johnson, should at least order a new trial.

2. Evidence of Johnson's statements to Special Agent Gardner was admitted improperly.

Prior to agreeing to answer Special Agent Gardner's questions, the defendant was not informed as to the possible charges against him. Under the rule of Miranda v. United States, 384 U. S. 436, 475, 477 (1966) it is clear that a person cannot waive his constitutional right to silence unless he does so in an intelligent manner. Several jurisdictions have ruled that, in order to make an intelligent waiver, the individual must first be informed as to the nature of the matter, and possible charges of which he is suspected. See Schenk v. Ellsworth, 293 F. Supp. 26 (D. Mont. 1968); State v. Barwick, 483 P.2d 670 (Idaho 1971); Commonwealth v. Collins, 259 A.2d 160 (Pa. 1969).

In Schenk, the defendant was told merely that the authorities wished to speak with him about a "shooting incident of his wife" and not that he was a murder suspect. The court stated, "Certainly it stands to reason that a suspect cannot intelligently make the decision as to whether or not he wants counsel if knowledge of the crime suspected is withheld from him. This knowledge is a

necessity for the free exercise of the right to counsel." 293 F. Supp. at 29.

Furthermore, the evidence of the Government fell short of demonstrating a waiver by Johnson. His signature was affixed to Exhibit 4 for the purpose of acknowledging that he had had the form read to him and not for the purpose of waiving his rights. Johnson looked at the form for 30 seconds or less, hardly time enough to digest the entire form and make a reasoned decision on whether he would waive his rights. Moreover, there was no evidence that Special Agent Gardner asked Johnson if he would waive his rights and answer questions; rather, after the signature was signed by Johnson - not for purpose of waiving his rights - Gardner asked questions of Johnson and received answers.

The Government failed to sustain its burden of proof that Johnson's answers were made after a knowing and intelligent waiver of his rights under Miranda. The evidence should not have been admitted.

3. Evidence of the illegal drugs analysis and identification was admitted improperly in that the Government did not establish its chain of custody.

There was a gap in the Government's evidence as to the custody and control of the drugs from December 28

to December 31. Acting Port Director Clark testified to receiving two packets on Friday, December 28, weighing 525 grams. He testified that he placed them in a safe in the office. There was no evidence as to whether the safe was locked or as to security of the safe between Friday and the following Monday. And, upon receipt of the package, the chemist testified that the drugs and their plastic containers weighed 210 grams less - a shrinkage of 40%! No explanation of this discrepancy has been made. Nor is it incumbent upon the defendant to fill in deficiencies in the Government's proof. The indictment charged that there were 1 1/2 pounds of drugs. The Government produced less than 3/4 of a pound of drugs.

In view of the evidence and lack of it concerning the drugs, their custody, weight and identification, testimony concerning identification and analysis of the drugs should have been excluded. The Government's evidence does not exclude the reasonable possibilities that someone tampered with them after their seizure by Mr. Clark or that the drugs sent to the chemist were not the same ones as were seized from Loewe's car.

4. The Court's instructions to the jury were prejudicial to Johnson.

(a) The Court omitted the last sentence of Johnson's request no. 11.

This request specifically asked the Court to advise the jury that evidence of prior criminal conduct could not be considered as bearing on the guilt or innocence of Johnson. (Tr. 433) Such an instruction - particularly in a case where the Government's evidence of guilt is weak - is required in order to make sure that the jury does not consider the evidence improperly. See United States v. Provoo, 215 F.2d 531 (2d Cir. 1954); United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974) (issue is not one of credibility; rather, issue is one of sufficiency of evidence connecting defendant to illegal drugs.)

(b) The Court omitted defendant's requests no. 9 and 10.

These requests asked the Court to instruct the jury to the effect that if the circumstances give equal support to opposite conclusions or do not exclude every reasonable hypothesis but that of guilt, then it must find the defendant not guilty. (Tr. 433) Johnson

recognizes that this rule is not the general one prevailing in this Circuit. However, exceptions exist to almost every rule; and in a situation such as this case, where the evidence of guilt is very weak, and where the subject matter of the crimes charged is emotionally tinged, the general rule should yield. The aim of criminal justice is to see that the guilty are convicted and that the innocent are not convicted. And it is basic to our system that guilty persons should go unpunished for lack of proper and sufficient evidence rather than an innocent person be convicted because of suspicious circumstances. Therefore, in a case such as this one, where Johnson's guilt is to be determined solely from circumstances which are equally consistent with his innocence, the Court should have instructed the jury as requested by Defendant in number 9 and 10. See United States v. Kearse, 444 F.2d 62 (2d Cir. 1971). Otherwise the "presumption of innocence" and the "burden of proof beyond a reasonable doubt" become mere slogans, receiving merely lip service. The evidence of guilt of Raymond Johnson was hardly overwhelming. It was weak! The Court recognized that fact during the trial (Tr. 168); the jury recognized that fact in its verdict on Count III.

In such a situation the instructions as requested should have been given. See United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974); Guevara v. United States, 242 F.2d 745 (5th Cir. 1957); cf. United States v. McConney, 329 F.2d 467 (2d Cir. 1964).

(c) The Court's instruction regarding false exculpatory statements was prejudicial to Johnson.

At one point in the Court's charge, the Court said that false exculpatory statements "are" evidence of guilty consciousness. (Tr. 477; see Appendix) While the Court attempted to correct this statement to the effect that they "may be" evidence of guilty consciousness, the prejudice to Johnson was not overcome, particularly where undue weight may be given to such evidence. See United States v. McConney, 329 F.2d 467 (2d Cir. 1964); Lee v. United States, 376 F.2d 98 (9th Cir. 1967); United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974).

(d) The Court's instruction regarding Johnson's knowledge of presence of the drugs was prejudicial.

At another point in the Court's charge, the Court said that the jury could find that Johnson "knew or should have known" of the presence of the drugs in Loewe's car. (Tr. 478; see appendix) Again, the Court's attempt to correct this statement was not sufficient to undo the pre-

judice to Johnson.

(e) The Court's instruction regarding Johnson and membership in a conspiracy was prejudicial.

At another point in the Court's charge, the jury was advised that it could make a judgment from the acts and conduct of the "members of the conspiracy - that is, Johnson and Loewe." (Tr. 484; see appendix) From this the jury could have concluded that the Court had determined the existence of a conspiracy between Johnson and Loewe and that it need not consider whether or not the Government had proved its case. Such an instruction was very harmful, since the conspiracy evidence was very weak. Johnson suffered prejudice as a result.

(f) The Court's instructions concerning conspiracy was confusing.

The jury was instructed that it could find that a conspiracy might have come into existence between the dates alleged in the indictment, being November 1, 1973, up to and including January 10, 1974. (Tr. 478, 485; see appendix) However, the Government relied only on one overt act, which took place December 28, 1973, and was committed by Loewe. The jury should have been instructed that it had to find that a conspiracy must have been formed prior to the commission of the overt act. Otherwise, it

could have determined that it came into existence between December 28, 1973, and January 10, 1974. Obviously, such a determination would have been improper, since a conspiracy is generally ended when the Government arrests a member of the alleged conspiracy. See Krulewitch v. United States, 336 U.S. 440 (1949); Grunewald v. United States, 353 U.S. 391 (1957). Accordingly, the Court's instructions were confusing to the jury.

While it may be argued that, singly, the exceptions to the Court's charge would not constitute harmful error, the aggregation of them does amount to such error. Johnson was termed by the Court to be a member of a conspiracy. Johnson's false exculpatory statements were stated flatly to be evidence of guilty consciousness, and it is highly speculative if the Court's attempt to correct this assertion was understood and appreciated by the jury. The Court's omission of the requested charges, coupled with the other erroneous and confusing inclusions, served to prejudice Johnson's case. The inherent inconsistency in the jury's verdict buttresses this conclusion.

A new trial should be ordered.

D. THE DISTRICT COURT ERRED IN DENYING JOHNSON'S MOTION TO ARREST THE JUDGMENT OF GUILTY AS TO COUNT I.

Count I should be dismissed, and the jury verdict set aside, on the ground that it became merged into the offense charged in Count II. Wherever a crime is committed by two or more persons, the Government's position would allow a conspiracy to be charged, since any joint action must have been predicated on prior planning. Such a position was not and should not be approved by the courts.

The philosophy underlying the development of the crime of conspiracy, which did not exist at common law, was to reach abuses of criminal procedure in England. The first statutes were drawn narrowly but became more expansive through judicial decisions in the seventeenth century so as to make criminal the agreement, whether or not its purpose was achieved. As it developed further, the crime of conspiracy had two objectives, preventive intervention and to strike against special dangers incident to group activity. See generally, LaFave & Scott, Handbook on Criminal Law 453-60 (1972).

As stated in Pinkerton v. United States, 328 U.S. 640 (1946), "The addition of a conspiracy count may at times be abusive and unjust..." Id. at 644, n.4. The Court, through Justice Douglas, went on to quote a 1925 report of the Conference of Senior Circuit Judges, in part as follows:

"the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement that this method of prosecution is used arbitrarily and harshly. Further, the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." Ibid.

In his dissent in Pinkerton, Justice Rutledge referred to the old doctrine of merger of conspiracy in the substantive crime and noted that the differences among conspiracy, aiding and abetting, and the substantive crime itself tend to be disregarded. The result, concluded Justice Rutledge, was to accomplish multiple punishment for the same acts but in the guise of not being double jeopardy. 328 U.S. at 649-50.

Where is there any evidence of conspiracy between Johnson and Loewe? There is none, yet the jury is allowed to infer it from what happened at the Port of Entry on December 28, 1973. Is this the type of ongoing, continuous, secretive criminal conduct made by a group planning to violate United States laws that is hoisted as the specter as to why we need the crime of conspiracy? It is not,

yet because of definitional problems a joint effort with very little preconcert of planning comes within the scope of conspiracy.

Under the circumstances as shown in this case, the finding of guilt in Count II should be deemed to have swallowed the conspiracy count, just as completion of a crime swallows the attempt. See LaFave & Scott, Handbook on Criminal Law, 438, 452. To do otherwise would be to place Raymond Johnson in double jeopardy and to require him to suffer multiple punishment for the same acts.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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January 9, 1975

United States Court of Appeals
for the Second Circuit

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|---------------------------|---|--------------------|
| United States of America, | : | |
| Appellee | : | |
| vs. | : | Docket No. 74-2437 |
| | : | |
| Raymond Johnson, | : | |
| Appellant | : | |

Certificate of Service

I do hereby certify that on the 9th day of January, 1975, I made service of the Brief for the Appellant and Appendix for the Appellant upon the United States of America, appellee, by mailing two copies of the same to George W. F. Cook, United States Attorney for the District of Vermont, P. O. Box 10, Rutland, Vermont 05701.

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